

No. 11982.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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E. F. SMITH,

*Appellant,*

*vs.*

JIM DANDY MARKETS, INC., FIREMEN'S FUND INSURANCE  
COMPANY, CENTRAL MANUFACTURERS' MUTUAL INSUR-  
ANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL  
INSURANCE COMPANY,

*Appellees,*

and

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COM-  
PANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE  
COMPANY,

*Appellants,*

*vs.*

JIM DANDY MARKETS, INC.,

*Appellee.*

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PETITION FOR REHEARING BY APPELLANT  
SMITH.

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## PETITION FOR REHEARING BY APPELLANT SMITH.

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*To the United States Court of Appeals for the Ninth Cir-  
cuit, and the Judges Thereof:*

Comes now E. F. Smith, the appellant in the above en-  
titled cause, and presents this, his petition, for a rehearing  
of the above entitled cause, and, in support thereof, re-  
spectfully shows:

I.

**Appellant Smith Is Entitled to a Decision on the Equities.**

Reformation of an instrument is an equitable function and a favorite exercise of equity jurisdiction. (10 Cal. Jur., Sec. 30, p. 489.) The California Code emphasizes the equitable nature of the procedure by directing that “for the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement.” (Cal. Civil Code 3400—Appellant Smith’s Opening Brief, p. 22.)

Courts of equity were created for the purpose of giving relief from inequitable and unconscientious results arising from the strict application of the law.

Appellant Smith is seeking equitable relief from the application of a rule of law by which the title to a building worth more than \$32,000.00 was transferred without any compensation, even though the building was never considered by anyone. It was never once mentioned in any of the negotiations or in any of the written documents, not even the assignment.

Appellant Smith is entitled to a decision on the equities of the case, which, it is respectfully submitted, the court’s opinion does not do but merely recites and gives effect to the rule of law from which appellant Smith is seeking relief in this equitable action.

## II.

### **The Opinion Is Mistaken as to the Issue.**

The court, in its opinion, reaches the conclusion that Smith had “conveyed the building” to Jim Dandy Markets at the time of the fire. It supports this conclusion by a recital of and reference to several incidents, all of which hinge on a “transfer” of the “building” from Smith to Jim Dandy Markets as a necessary and essential part of the entire transaction. No consideration whatever is given to a transfer of the title to the building.

The only issue submitted by Smith is that there was no transfer of nor intention to transfer title to the building. He at no time, before or since the fire, asserted or claimed any right to disturb the use and occupancy of the building by Jim Dandy Markets as specifically and directly established in the agreements. The question before the court is whether Smith intended to convey his title to the building. No other issue is submitted.

The building had already been transferred to Jim Dandy Markets which was and had been in possession of it for nearly a year at the time of the supplementary and modified agreement. Following the consummation of the supplementary and modified agreement and up to and at the time of the fire, Jim Dandy was still in possession of the building. Its status was established in a document executed in consummation of the original agreement and entitled “Sublease.” [Record 195.] This document subleased the real property and by its terms declared the building to belong to Smith. [Record 197, 199.] It was to run for the unexpired term of the land leases, including the time covered by options of renewal [Record 198] for a period not exceeding ten years. [Record 200.]



Thus the "building" had already been conveyed and transferred for a period of ten years, and Smith had no right to remove or otherwise interfere with its use and occupancy by Jim Dandy Markets prior to the termination of that term.

The issue is only as to the transfer of the title to the building.

### III.

#### **The Facts Do Not Support a Conclusion That Smith Intended to Convey Title to the Building.**

The facts to which reference is made by the court are not pertinent to and do not support a conclusion that Smith intended to convey the title to the building.

Thus the court states that the purpose of the agreement could not be attained through the transfer of the land and equipment but not the store building. The title to the land was not transferred and could not be by the parties involved. The use and occupancy of the store building coincided with the right to use and occupy the land. The ownership of the title to the building by Smith was no more disturbing than was the ownership of the title of the land by the landlord.

The reservation of the right to remove the building at the termination of the lease did not plunge the agreement into inconsistency and confusion any more than did the right of the owner of the land to refuse to renew the lease when the term expired.

If Smith had immediately attempted to remove the building or if there had been any other threatened or anticipated interference with its use and occupancy by Jim



Dandy Markets, the statement of the court that the land lease, fixtures, equipment, and machinery had no usefulness apart from the building would be pertinent, but such was not the case. We are talking only about a transfer of title without any change in the use or occupancy.

The same is true of the court's statement that Jim Dandy intended to gain complete control over the facilities. It already had such control, and the control was not disturbed by the ownership of the title by Smith. He did not claim or threaten any disturbance of such control. He was in no different position than the owner of the land as to what would be done at the end of the term.

The court supports its conclusion by a statement that there is no reference to rent for the Atlantic Market. The building, as established by the insurance company's appraisal, was worth in excess of \$32,000.00. The evidence is uncontradicted and unassailed that the value of the building was not included in the price for which the fixtures and equipment were sold. The court, by its opinion, takes title to the building from Smith without any consideration whatever and gives it to Jim Dandy without any payment whatever. It then attempts to support this inequitable result by reference to another inequity—the failure of Smith to get rent for the building. One inequity does not justify a court of equity approving another. No fact is cited supporting a conclusion that Smith intended to convey title to the building or that Jim Dandy Markets expected to receive title thereto. And there are no facts supporting such conclusion in the record.

IV.

**If an Intent to Convey the Title to the Building Is to Be Found From the Assignment Itself, It Should Be Reformed as Being Executed Under a Mutual Mistake.**

The attorney for Jim Dandy Markets during the oral argument before this court probably made an accurate statement of what actually happened when he said that everyone just forgot about the building. This being true, the assignment should be reformed so as not to convey title to the building. Certainly Smith did not intend to give away a building worth more than \$32,000.00. Certainly Jim Dandy Markets did not expect to receive title to a building of that value without paying for it. Instead of bringing about the unjust enrichment of Jim Dandy at the expense of Smith, this court of equity should correct the error, if any, so as to leave the parties with their own property.

Furthermore, the recognition of the title of the building in Smith will not, in any large amount, be detrimental to Jim Dandy. It had an insurable interest in the building and is entitled to recover its losses as a result of the fire. Although Jim Dandy has been carrying on the fight, the actual benefit is that reaped by Smith's insurance carrier. A declaration that the title to the building is in Jim Dandy relieves it from liability on a policy for which it collected premiums from Smith. If the title of Smith is established by this court, Smith will then be in position to make demands on his insurance carrier for

his losses. This is all equitable and a result which a court of equity should strive to bring about. A rehearing should be granted, consideration given to the equities and the point in issue, and the judgment of the District Court reversed.

Respectfully submitted,

CLYDE THOMAS,

MILAN MEDIGOVICH,

*Attorneys for Appellant Smith.*

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**Certificate of Counsel.**

I, counsel for the above named appellant Smith, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

CLYDE THOMAS,